

UNITED STATES DISTRICT COURT  
DISTRICT OF NEW JERSEY

LERROY "BUD" BENSEL, ET AL.,

Plaintiffs,

v.

ALLIED PILOTS ASSOCIATION, ET  
AL.,

Defendants.

HONORABLE JOSEPH E. IRENAS

CIVIL ACTION NO. 02-2917 (JEI)

**ORDER DENYING PLAINTIFFS'  
MOTION IN LIMINE TO PERMIT  
EVIDENCE AT TRIAL OF  
DEFENDANT'S SPOILIATION  
(DOCKET # 372)**

**APPEARANCES:**

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**IRENAS**, Senior District Judge:

1. This matter appears before the Court upon Plaintiffs' Motion in Limine to Permit Evidence at Trial of Defendant's Spoliation. For the reasons set forth below, the Court will deny Plaintiffs' Motion.

2. The Court presumes familiarity with its earlier Opinions and Orders in this ongoing litigation, and will only include details relevant to the present Order. Plaintiffs first moved for spoliation sanctions against Defendant on March 13, 2009.

The Court denied that motion on December 17, 2009. See *Bensel v. Allied Pilots Ass'n*, 263 F.R.D. 150, 151 (D.N.J. 2009). While the Court noted that Defendant "should have moved more quickly to place litigation holds" on certain documents, the Court held that it "did not see any evidence of bad faith" and that spoliation sanctions were not appropriate. *Id.* at 153. Plaintiffs then moved for reconsideration of the Court's order, which the Court denied on July 8, 2010. In the Joint Final Pretrial Order, the Plaintiffs once again sought spoliation sanctions, which were denied on February 8, 2011.

3. A motion for reconsideration may only be granted on the ground that (1) an intervening change in the controlling law has occurred; (2) evidence not previously available has become available; or (3) vacating the Order is necessary to correct a clear error of law or manifest injustice. *North River Ins. Co. v. CIGNA Reinsurance Co.*, 52 F.3d 1194, 1218 (3d Cir. 1995).<sup>1</sup> Plaintiffs have not presented evidence not previously available and have not shown that vacating the Court's Orders is necessary to correct a clear error of law or manifest injustice.

5. Instead, Plaintiffs argue that there has been an intervening change in the controlling law which warrants the

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<sup>1</sup> Because the Court has made multiple previous orders denying spoliation sanctions, this motion will be treated as a motion for reconsideration despite Plaintiffs assertions otherwise.

imposition of sanctions. The Court disagrees.

6. Generally, to determine spoliation of evidence, four factors must be found: (1) the evidence in question must be within the party's control; (2) it must appear that there has been actual suppression or withholding of the evidence; (3) the evidence destroyed or withheld was relevant to claims or defenses; and (4) it was reasonably foreseeable that the evidence would later be discoverable." *Paluch v. Dawson*, 2009 WL 3287395, at \*2 (M.D.Pa. 2009); *Brewer v. Quaker State Oil Refining Corp.*, 72 F.3d 326, 334. While there is no duty to keep or retain every document in the party's possession, "even in advance of litigation, it [a party] is under a duty to preserve what it knows or reasonable should know, will likely be requested in reasonably foreseeable litigation." *Ogin v. Ahmed*, 563 F.Supp.2d 539, 543 (M.D.Pa. 2008). In the Third Circuit, the test for whether sanctions are appropriate for spoliation of evidence is: "(1) the degree of fault of the party who altered or destroyed the evidence; (2) the degree of prejudice suffered by the opposing party; and (3) whether there is a lesser sanction that will avoid substantial unfairness to the opposing party and, where the offending party is seriously at fault, will serve to deter such conduct by others in the future." *Schmid v. Milwaukee Elec. Tool Corp.*, 13 F.3d 76, 79 (3d Cir. 1994).

6. Each of these tests implicitly requires evidence of bad

faith. *Bensel*, 263 F.R.D. at 152. As noted *supra*, this Court has held that Plaintiffs have presented no evidence of Defendant's bad faith and that the imposition of spoliation sanctions is therefore not appropriate. Plaintiffs argue that sanctions can be imposed even in the absence of bad faith, relying primarily on *Pension Committee of Univ. Of Montreal v. Banc of America Securities, LLC*, 685 F.Supp.2d 456 (S.D.N.Y. 2010). *Pension Committee* is not controlling for this case and was decided before the Court denied Plaintiffs' initial motion for reconsideration, and therefore does not meet the standard required for the granting of a motion for reconsideration. Further, *Pension Committee* repeatedly emphasizes that the determination of sanctions is to be determined on a case-by-case basis, and is "inherently subjective." *Pension Committee*, 685 F.Supp.2d at 469, 471. The Court has already analyzed the question of spoliation sanctions on multiple occasions and held that they are not appropriate in this case. In the absence of new evidence of bad faith or change of controlling law, those holdings will stand and Plaintiffs' Motion will be denied.

**IT IS** on this 27th day of April, 2011,

**ORDERED THAT:**

Plaintiffs' Motion in Limine to Permit Evidence at Trial of Defendant's Spoliation is hereby **DENIED**.

s/ Joseph E. Irenas  
JOSEPH E. IRENAS, S.U.S.D.J.